IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 48
5360756

	BETWEEN	NZ MARINE TURBOCHARGERS LIMITED Applicant
	A N D	MICHAEL HILLERBY Respondent

Member of Authority: Helen Doyle

Representatives: Graham Allan and Martin Logan, Counsel for Applicant
Jeff Goldstein, Counsel for Respondent

Submissions Received: 11 January 2012 from Applicant
21 February 2012 from Respondent

Date of Determination: 22 March 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] This employment relationship problem was set down for an Authority investigation meeting on 13 December 2011. In the afternoon of 12 December 2011 the applicant withdrew its claim against Mr Hillerby. The respondent has applied for costs.

[2] The Authority and Employment Court have previously awarded costs where a proceeding has been withdrawn prior to the hearing. In doing so a variety of factors have been considered including the time at which the matter was withdrawn, and the amount of preparation required prior to withdrawal.

[3] Mr Goldstein submits the respondent's actual costs incurred up to 12 December 2011 are $9,000 plus GST and disbursements of $251.00 being a return air ticket for Mr Goldstein to Nelson that was non-refundable. Mr Goldstein submits that his hourly rate at $300 represents approximately 30 hours of work and was reasonable.

[4] Mr Goldstein refers to the Employment Court judgment in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and sets out the principles therein that the Court has said are appropriate in the exercise of a discretion as to costs. There was reference in *Da Cruz* to a tariff approach adopted by the Authority and Mr Goldstein submits that the Authority should consider the following steps:

- *Consider the actual legal costs and expenses of the successful party.*
- *Determine whether these costs are reasonable.*
- *Determine what proportion of costs of costs to be met.*

[5] In terms of the final point Mr Goldstein submits there should be an award of indemnity costs against the applicant. He refers to the Court of Appeal judgment in *Bradbury v. Westbank Banking Corporation* [2009] NZCA 234 where the Court referred to non-exhaustive categories of circumstances in which indemnity costs have been awarded.

[6] Mr Goldstein submits that the applicant effectively made allegations of fraud against the respondent and commenced proceedings for ulterior motives making it difficult for the respondent to start up and operate his business and that it brought the proceedings with a wilful disregard to the known facts.

[7] Mr Goldstein submits that in terms of the claim for indemnity costs the Authority should have regard to the urgency sought by the applicant, the applicant's refusal to agree to an adjournment of the investigation, the lack of substance of the applicant's claim and the way the applicant dealt with the matter which increased the costs to the respondent.

[8] Mr Goldstein also submits the respondent provided his computer for an audit by the applicant's chosen computer representatives and that was one of the orders asked for by the applicant.

The applicant's submissions

[9] Mr Allan on behalf of the applicant opposes any order for costs but submits that if one is to be made it should be on a confined basis. Mr Allan submits that the applicant has not conceded the merits of the respondent's position but felt it was left

with little option after it had been let down by an expert witness and the Authority had refused an adjournment.

[10] The applicant submits that it had briefed a company which it was led to believe had the appropriate expertise in computer forensic analysis but the expert mishandled the analysis of the respondent's laptop computer and the test was largely useless.

[11] The applicant submits that when problems with the expert became apparent the applicant had to go to Auckland to get the required expertise and it was clear that a proper analysis could not be completed in time for the defended hearing.

[12] The applicant was left with making a decision to either withdraw the claim or proceed without having all the evidence. Mr Allan submits that the applicant acted reasonably in bringing the proceedings and trying to have them disposed of urgently.

[13] The respondent submits that if there are to be costs awarded they should be minimal and that the respondent's position was always that he took no confidential information and accordingly his position has been very simple and the only costs have been preparation of two briefs and mediation.

Determination

[14] I turn firstly to the behaviour by the applicant that Mr Goldstein refers to in a claim for indemnity costs. The problem the applicant wished the Authority to resolve was whether the respondent, an employee, had removed documentation and information about its business was confidential. It was alleged that this had occurred by removing or downloading information from the applicant's computer systems and office records. The applicant wanted an order that the respondent make available his computer and that was agreed to. It says that the result of the computer analysis was not helpful and in essence it was let down by the computer company and wanted another company to undertake an analysis. The Authority refused an adjournment and the claim was then withdrawn.

[15] In an Employment Court judgment of *Pars Transport Limited v. Lardelli* WC 25/06 13 December 2006 the Court was prepared to award full indemnity costs of $13,500 in a case where the withdrawing party had been guilty of delaying tactics,

timetabling breaches and conduct that resulted in the other side's preparation being unnecessarily duplicated.

[16] I am not satisfied that when the non exhaustive categories of *Bradbury* and the issues that were apparent in *Pars Transport* are considered this matters falls within the same category in terms of exceptional bad behaviour. The applicant did comply with Authority directions, did not attempt to delay the proceedings once the Authority became involved but when it realised that it did not have what it required in terms of forensic computer evidence withdrew its claim. I am not satisfied in this case that the elements that may cause an award of indemnity costs to be made were present. On the face of the application there was reason to given the matter priority in terms of the substantive hearing.

[17] I find that the respondent is entitled to a contribution towards reasonable costs but not on an indemnity basis. The appropriate exercise of my discretion as to costs is to consider the work actually done in preparation for the hearing by the respondent and award an appropriate contribution toward the cost of that work taking into account that the claim was withdrawn the afternoon before the investigation meeting.

[18] When the matter was initially lodged with the Authority the respondent was represented by a different solicitor in Nelson and then Mr Goldstein was instructed. A very brief statement in reply was lodged denying the allegations contained in the statement of problem and any entitlement to orders sought. A telephone conference was held with the Authority on 9 November 2011 with Mr Goldstein and Mr Logan.

[19] The parties agreed at that telephone conference to attend urgent mediation and to discuss access to the respondent's computer for the purpose of examining whether it contained any relevant data. I do not find it is appropriate to take into account the costs of attending at the mediation. The matter was set down for an investigation meeting in Nelson on Tuesday 13 December 2011. There was a timetable set for an amended statement of problem to be lodged. The Authority in its notice of direction asked Mr Logan to advise if mediation did not resolve the matter and then a further telephone conference would be held.

[20] On 10 November 2011 Mr Goldstein advised the Authority that he had been instructed to seek an adjournment of the investigation meeting as there was insufficient time between the mediation date of 29 November 2011 and the proposed

investigation date to fully and properly prepare for an investigation meeting. That adjournment was unacceptable to the applicant. A further telephone conference was then held on 18 November 2011 at which the adjournment request was discussed and declined. Timetabling directions for statements of evidence were made with a view to accommodating the mediation and investigation meeting dates.

[21] The respondent then provided an amended statement in reply together with two statements of evidence. I accept Mr Allan's submission that the statement of evidence could be described as fairly brief.

[22] On 12 December 2011 Mr Logan wrote to the senior support officer at the Employment Relations Authority seeking an adjournment of the investigation meeting for 13 December 2011 on the basis that there was inadequate time to carry out a thorough analysis of the respondent's laptop.

[23] Mr Goldstein opposed that adjournment and a further telephone conference was held with the Authority at which time the Authority confirmed that the adjournment request would not be granted. Later that day the applicant withdrew the claim with its intention to reissue proceedings once additional evidence was obtained.

[24] The respondent took all the preparatory steps for an investigation meeting. Although the applicant withdrew its claim just hours before the investigation meeting the respondent has been put to considerable expense. In the exercise of my discretion I have reflected on what the position in terms of costs would have been if the matter had proceeded to an investigation meeting and he had been successful. I do not find it would be fair to award significantly less than what would have been awarded if the matter had progressed given the very late withdrawal of the proceedings. The Authority now recognises the daily tariff as $3,500. I make a reduction of $500 to recognise that the matter did not proceed but that there was still an element of considerable wasted costs on the part of the respondent.

[25] In all the circumstances I am of the view that an appropriate and fair award of costs would be the sum of $3,000 that equates to at Mr Goldstein's hourly rate ten hours work together with Mr Goldstein's airfare of $251.00 that was not refundable.

[26] I order NZ Marine Turbochargers Ltd to pay to Michael Hillerby the sum of $3,000 being costs together with disbursements of $251.00.

Helen Doyle
Member of the Employment Relations Authority